FOR ARGUMENT

No. 91-712

Supreme Court, U.S.
FILED
MAR 4 1992
OFFICE OF THE CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

UNITED STATES OF AMERICA,
Petitioner,

v.

HUMBERTO ALVAREZ-MACHAIN,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF OF THE GOVERNMENT OF CANADA AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

AXEL KLEIBOEMER
2600 Virginia Avenue, N.W.
Suite 513
Washington, D.C. 20037
(202) 337-9030
Counsel of Record for Canada

Of Counsel:
WILLIAM H. CORBETT, Q.C.
Senior General Counsel
Department of Justice
Ottawa, Canada

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

BEST AVAILABLE COPY

TABLE OF CONTENTS

	Page
INTEREST OF THE *AMICUS CURIAE*	5
SUMMARY OF ARGUMENT	4
ARGUMENT	5
EXTRADITION TREATIES INCORPORATE THE USAGES OF CIVILIZED NATIONS WHICH REJECT PETITIONER'S POSITION	5
1. Civilized nations do not endorse the principle advocated by petitioner	6
2. Neither Canada nor the United States have previously accepted the principle now advocated by petitioner	8
CONCLUSION	14
APPENDIX A	
Statement of Secretary Shultz, June 22, 1983	1a
APPENDIX B	
Letter of Secretary Shultz, January 11, 1988	4a
APPENDIX C	
Letter of Secretary Clark, January 11, 1988	6a
APPENDIX D	
Department of External Affairs Note No. JLAC-0734, April 24, 1991	7a
APPENDIX E	
Canadian Embassy Note No. 542, October 13, 1982	9a

TABLE OF AUTHORITIES

Cases: Page

American School of Magnetic Healing v. McAnnulty, 187 U.S. 94 (1902) 14

Re Argoud, 45 I.L.R. 90 (Cour de cassation 1964) 7

Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964) 5

Canada v. Wainwright, et al., No. 85-3248 (11th Cir., April 11, 1985) 11

Canada v. Wainwright, et al., Misc. No. 83-661-Civ. J-16 (M.D. Fla., January 31, 1986) 11

Carbon Fuel Co. v. United Mine Workers of America, 444 U.S. 212 (1979) 5

Ex parte Hartley, [1978] N.Z.L.R. 199 (High Court of New Zealand 1978) 6

Jaffe v. Smith, 825 F.2d 304 (11th Cir. 1987) 12

In re Jolis, 7 Ann. Dig. 191 (Tribunal Correctionel D'Avesnes 1933) 7

Kear v. Hilton, 699 F.2d 181 (4th Cir. 1983) 12

Ker v. Illinois, 119 U.S. 436 (1886) 10

Matter of Nollet, Journal du Droit Int'l. 1188 (Cour d'appel de Douai 1891) 7

The Paquete Habana, 175 U.S. 677 (1900) 5, 9

R. v. Bow Street Magistrates, Ex parte Mackeson, 75 C.A.R. 24 (Court of Appeal 1981) 6

R. v. Walton, 11 Ont. L.R. 94, 10 C.C.C. 269 (1905) 9

United States v. Rauscher, 119 U.S. 407 (1886) 7

United States v. Unverzagt, 299 F. 1015 (W.D. Wash. 1924), aff'd. *sub nom. Unverzagt v. Benn*, 5 F.2d 492 (9th Cir.), cert. denied, 269 U.S. 56 (1925) 8-9

Constitutions and Treaties:

Canadian Charter of Rights and Freedoms, Sec. 7 9

Treaty of Extradition, December 3, 1971, U.S.-Canada, 27 U.S.T. 985, T.I.A.S. No. 8237 2

TABLE OF AUTHORITIES—Continued

Miscellaneous: Page

C. Cole, *Extradition Treaties Abound But Unlawful Seizures Continue*, Int'l. Perspectives 40 (Can. Dep.t of Ext. Affairs, March-April 1975) 9, 10

Department of External Affairs Note No. JLAC-0734 (April 24, 1991) 12

Hearing on S. 1373, S. 1429, and S. 1508 Before the Subcomm. on Security and Terrorism of the Senate Comm. on the Judiciary, 99th Cong., 1st Sess. (1986) 9

M. Isikoff, *U.S. "Power" on Abductions Detailed*, The Washington Post p. A14 (Aug. 14, 1991) 3

A. LaForest, *Extradition To and From Canada* (1991) 9

4 J. Moore, *A Digest of International Law* (1906) 10

O'Higgins, *Unlawful Seizure and Irregular Extradition*, 36 British Yearbook of Int'l. L. 279 (1960) 9

Preuss, *Kidnaping of Fugitives From Justice on Foreign Territory*, 29 Am. J. Int'l. L. 502 (1935) 7

Preuss, *Settlement of The Jacob Kidnaping Case*, 30 Am. J. Int'l. L. 123 (1936) 7

Symposium, 24 Cornell Int'l. L.J. 52 (1991) 3

III Travers, *Le Droit Penal International* (Paris 1924) 7

U.S. Embassy Note No. 94 (April 8, 1991) 12

U.S. Embassy Note No. 133 (May 23, 1991) 13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-712

UNITED STATES OF AMERICA,
Petitioner,

v.

HUMBERTO ALVAREZ-MACHAIN,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF OF THE GOVERNMENT OF CANADA AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

Pursuant to Rule 37 of the Rules of this Court, Canada respectfully submits this brief as *amicus curiae* to urge the Court to affirm the decision below in favor of the respondent, for the legal reasons stated therein.

The petitioner and the respondent have consented to the submission of this brief, and their written consents have been lodged with the Clerk of the Court.

This brief does not address any contested factual matters, but it is premised on the judicial findings below that respondent was involuntarily abducted from the territory of Mexico through the efforts of officials of the United States government. Canada also does not discuss the application of extradition treaties to the *in personam* jurisdiction of American courts where an accused has been

involuntarily removed from the territory of another nation in an exercise of the War Powers.

INTEREST OF THE *AMICUS CURIAE*

The issues presented in this case could have a profound effect on Canada-USA extradition relations.

Canada files this brief out of concern for the practice of transborder abductions of fugitives contrary to law. Such abductions contravene fundamental principles of justice that Canada has sought to uphold. They conflict with Canada's sense of the way the return of fugitives with its great neighbor ought to be conducted. Abductions offend against Canada's view of the law in international affairs. Canada is concerned that the United States Government considers it permissible for a law enforcement agency, sworn to uphold the law, to violate a treaty relationship, the sovereignty and laws of a treaty partner and the rights of a fugitive resident of a treaty partner.

Canada has a long tradition of international cooperation through extradition treaties with the United States beginning with the Jay Treaty of November 19, 1794 between Great Britain and the United States. Since 1842, rendition has been governed by a series of agreements of which the extant Treaty of Extradition of December 3, 1971, 27 U.S.T. 985, T.I.A.S. No. 8237 ("Treaty") came into force on March 12, 1976. A Protocol to this Treaty, significantly broadening the types of offenses for which extradition could be granted, came into force on November 26, 1991.

The Treaty, on a reciprocal basis, establishes a comprehensive system for rendition of fugitives, describes the nature of offenses for which extradition may be sought, and guarantees every fugitive access to the courts of the requested nation in order to test the validity of a rendition request.

The Treaty is part of the law of Canada and was negotiated with the understanding by Canada that the agree-

ment would provide the exclusive means whereby Canada and her constituent provinces, and the United States and its constituent states would seek to obtain custody of fugitives from each other.

Because this case affects the construction of all of petitioner's extradition treaties it raises doubt concerning the correctness of Canada's perception of the mutually agreed upon manifest scope and purpose of the Treaty.[1] Moreover, in this case, the United States seeks the *imprimatur* of the Court to abrogate if necessary, the right of Canadian citizens and others to access Canadian courts, contrary to its solemn undertaking in the Treaty to respect that right.

Canada and the United States enjoy an undefended border more than 3000 miles in length. The ease with which this border may be crossed accounts for the fact that approximately 50% of all American requests for extradition are made to Canada. In 1991, the United States made 74 requests for extradition to Canada and Canada made 47 requests to the United States. Many of these requests emanate from state and local authorities. Transborder incidents, involving bounty hunters, resulted in an exchange of notes in 1988 between Secretary of State George P. Shultz and Secretary of State for External Affairs Joe Clark in an attempt to partially resolve the problem. The position adopted by the petitioner in this case, however, raises a potentially far more serious problem; the spectre not only of federal, but more likely of

---

[1] According to newspaper reports, the United States' view generally coincided until recently with that of Canada. See Michael Isikoff, *U.S. "Power" on Abductions Detailed*, The Washington Post p. A14 (August 14, 1991), contrasting views expressed by the U.S. Department of Justice's Office of Legal Counsel in written opinions prepared in 1980 and in 1989 by then Assistant Attorneys General John M. Harmon and William P. Barr, respectively. See *Symposium*, 24 Cornell Int'l L.J. 52 (1991) (analyzing the two opinions in detail).

official state and local incursions to abduct fugitives, where extradition is seen as too costly, too slow or unavailable, in violation of Canada's territorial integrity. This unlawful conduct would in effect be sanctioned in United States law by a decision favoring petitioner.

Canada has an interest in ensuring that its treaties are given that construction and application which their express terms, nature, scope and purpose require. Moreover, Canada has an interest, indeed an obligation to its citizens, in taking all steps necessary to protect the rights of its inhabitants and its sovereign interest in its territorial integrity, guaranteed by the Treaty and international law.

SUMMARY OF ARGUMENT

Canada submits that the current position of the United States departs from established practice in the relations between the United States and Canada, and among other nations, on which many extradition treaties have been built. Ultimately it departs as well from common sense underpinnings of all such treaties, which is to substitute the rule of law for force in such matters as national sovereignty, the right to give asylum, and the orderly cooperation in the enforcement of criminal laws.

Canada views transborder abductions from Canada to the United States as breaches of the Canada-United States Extradition Treaty and breaches of Canada's sovereignty. Other civilized nations, as well, would not agree with the position of petitioner in this case; they would insist that unless a nation otherwise consents to a removal of a person from its territory, an extradition treaty is the exclusive means for a requesting government to obtain such a removal and that it is the policy of nations to request return of abducted persons. Canada and its component governments do not hold to a policy of abductions from American territory, and if abductions occur, they could not reasonably expect the United States to acquiesce

in Canadian courts' disrespect of U.S. sovereignty through exercise of jurisdiction over abducted individuals. The Government of Canada would, upon protest, cooperate to obtain the return of an abducted fugitive.

ARGUMENT

EXTRADITION TREATIES INCORPORATE THE USAGES OF CIVILIZED NATIONS WHICH REJECT PETITIONER'S POSITION.

In the United States "[i]nternational law is part of . . . law, and must be ascertained and administered by the courts of justice . . . as often as questions of right depending upon it are duly presented for their determination." *The Paquete Habana*, 175 U.S. 677, 700 (1900); see also *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 424 (1964). In Canada's view, this is such a case and hereafter, we set forth the law, customs and usages of civilized nations which suggest that official abductions are unlawful and require restitution of the *status quo ante*. Just as such usages would be considered to be incorporated in a domestic contract, see *Carbon Fuel Co. v. United Mine Workers of America*, 444 U.S. 212, 221-22 (1979), they are part of the background reflecting the common understanding of nations, including Canada, in entering into extradition treaties.

Canada has consistently maintained the position both in diplomatic correspondence and in oral representations that transborder abduction from Canada to the United States constitute breaches of the Canada-United States Extradition Treaty. For example, a Canadian Embassy Note of October 13, 1982 to the Department of State, which referred to a Canadian Department of Justice Memorandum of Law which had been delivered to the United States Department of Justice, stated: ". . . under U.S. law, the Federal Government of the U.S.A has the obligation to assist Canada by commencing proceedings leading to Jaffe's return to Canada. This obligation is

based on the violation of the Canada-U.S.A. Extradition Treaty, a violation attributable to the '. . . actions of state officials or from the actions of those persons who act at the instigation of and/or under color of authority of a State . . .' ". *Appendix*, p. 9a. Most recently, in a note dated April 24, 1991 to the United States Embassy in the Hills case, the Department of External Affairs stated: "The Extradition Treaty, along with the relevant multilateral conventions, if any, established the only means under which to obtain the return of fugitive offenders." *Appendix*, p. 7a. Both cases giving rise to the representations are discussed below.

Hereafter, Canada sets forth a survey of some of the incidents and expressions of policy which show the understanding in international law that abducted persons must be returned to a nation when it protests the infringement of its sovereignty. The survey describes incidents which have arisen between various civilized nations, and then turns to incidents specifically involving the United States and Canada, in each instance summarizing relevant policy expressions as well. All seem to reflect a clear acceptance of the principle which petitioner is seeking to pretermit, regardless whether the incidents were settled juridically or diplomatically or whether policy statements are involved.

1. Particularly instructive is the case of *R. v. Bow Street Magistrates, Ex Parte Mackeson*, 75 C.A.R. 24 (1981). In this case, as a result of steps initiated by English police authorities, a British subject was deported from "Zimbabwe-Rhodesia" to the United Kingdom in a blatant attempt to evade the provisions of the Fugitive Offenders Act of 1881, an act of Parliament which regulated extradition among Commonwealth nations. The Lord Chief Justice prohibited Mackeson's prosecution on the ground that the provisions of the 1881 Act should have been followed citing with approval the decision of the High Court of New Zealand in *Ex parte Hartley* [1978] N.Z.L.R. 199, where a New Zealand citizen—in-

stead of proper extradition being sought—at the request of New Zealand police authorities had been put on an airplane in Australia and sent back to New Zealand.[2]

French courts also subscribe to the principle that official transborder abductions must be judicially rectified. See *In re Jolis*, 7 Ann. Dig. 191 (Tribunal Correctionel D'Avesnes 1933); *Matter of Nollet*, Journal du Droit Int'l. 1188 (Court d'appel de Douai 1891). But see *Re Argoud*, 45 I.L.R. 90, 95-97 (Cour de cassation 1964).

Earlier German recognition of the principle that official transborder abductions must be rectified by repatriation, is reflected in the *Schnaebele* and the *Jacob-Salomon* cases. In the *Schnaebele* case, described in III Travers. *Le Droit Penal International* 151-54 (Paris 1924), a French police official was lured across the border by a promise of an official safe-conduct. Ten days after his arrest in Germany, the Imperial German Government ordered Schnaebele's release because of the official promise of safe-conduct, after a French protest. In the *Jacob-Salomon* case, a stateless person was kidnapped in Switzerland by a Gestapo agent and taken to Germany. Germany resisted Swiss protests on the ground that there was an absence of proof concerning official German involvement. Switzerland then invoked compulsory arbitration and, before a decision was rendered, Germany conceded and returned the abducted person. Preuss, *Kidnaping of Fugitives From Justice On Foreign Territory*, 29 Am. J. Int'l. L. 502, 502-04 (1935); Preuss, *Settlement of The Jacob Kidnaping Case*, 30 Am. J. Int'l. L. 123 (1936).

---

[2] Petitioner's reliance on earlier British cases, e.g., Pet. Br. 14 n. 9, and 30 n. 25, must be assessed in light of *Ex parte Mackeson*. While it is true that British courts follow the reasoning that presence of an accused confers jurisdiction, even though there was a transborder abduction, official evasion of statutory extradition procedures results in staying of the prosecution. In the United States, of course, extradition treaties have the force of law. *United States v. Rauscher*, 119 U.S. 407, 418-19 (1886) (explaining the differing status of treaties under American and British law).

In connection with the transborder abduction, in 1981, of a Canadian citizen by American bounty hunters acting—according to evidence available to Canada—pursuant to a plan conceived by Florida officials, the Canadian Department of External Affairs queried competent officials of other nations and requested their comments concerning official transborder abductions. A similar survey was made in 1992. Replies were received from Australia, Austria, Britain, Finland, Germany, The Netherlands, Norway, New Zealand, Sweden and Switzerland. All countries indicated that they would regard such an abduction as a violation of their sovereignty and would protest. All countries indicated that they would regard such abductions as a violation of international law. Swiss officials stated that an officially sponsored abduction, in the context of existing rendition procedures and treaties, would be considered by them a violation of the principle of "loyalty and good faith" recognized in international law. Australia, Britain, Norway, Sweden and New Zealand consider it a violation of bilateral extradition treaties. Britain, Finland, Germany, and The Netherlands, would demand the return of the abducted person. If an abducted person were returned to their territory, and brought before their courts, Austria, Finland, The Netherlands, Norway, Sweden and Switzerland would consider that the abducted person should be returned.

Without doubt, therefore, the position of the petitioner herein diverges substantially from generally accepted norms of international conduct and appears contrary as well to the custom under which the Canadian and United States governments have heretofore informally resolved analogous matters, which we will now examine.

2. In dealing with one another, Canada and the United States have traditionally subscribed to the principle that —in the face of a protest—an official transborder abduction must result in repatriation.[3] Such a custom or usage

---

[3] Only two incidents appear to diverge: *United States v. Unverzagt*, 299 F. 1015 (W.D. Wash. 1924), aff'd *sub nom. Unverzagt v.*

is, of course, a legitimate source for ascertaining the obligations of nations. *The Paquete Habana*, 175 U.S. 677, 700 (1900).

C. Cole, *Extradition Treaties Abound But Unlawful Seizures Continue*, Int'l Perspectives 40 (Can. Dept. of Ext. Affairs, March-April 1975), contains a summary of a number of such incidents to the date of publication. Among others, Cole reported the cases of *Lafond* (1908) and *Marker* (1909), each of which involved an official transborder abduction from the United States to Canada. In each case following United States protests and demands for repatriation, criminal proceedings were stayed by Canadian authorities and the abducted person was repatriated. *Id.* at 40, 41.

Other cases, all involving official abductions from United States territory to Canada, and a subsequent repatriation and staying of a criminal proceeding following United States protests, were: *Grogan* (1841), involving a seizure by British soldiers, O'Higgins, *Unlawful Seizure and Irregular Extradition*, 36 British Yearbook of Int'l L. 279, 294 (1960); the *Convict Case* (1876), referred to by former U.S. State Department Legal Adviser Abraham D. Sofaer, in *Hearing on S.1373, S.1429, and S.1503 Before the Subcommittee on Security and Terrorism of the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. 69 (1986), involving transportation of a convict through Alaska; and the *Unidentified Youth Case*

Benn, 5 F.2d 492 (9th Cir.), cert. denied, 269 U.S. 56 (1925), and *R. v. Walton*, 11 Ont. L.R. 94, 10 C.C.C. 269 (1905). Both cases involved officially sponsored transborder abductions. Significantlly, however, the Canadian Government has been unable to find any record of a diplomatic protest in the former case and there was no diplomatic protest in the latter case. Moreover, *Walton* was decided before adoption, in 1981, of the *Canadian Charter of Rights and Freedoms*, which in Section 7 provides that everyone has the right to life, liberty and security of the person and is not to be deprived thereof except in accordance with fundamental justice. A. LaForest, *Extradition To and From Canada* 47 (1991). There has been no judicial construction of the effect of the *Charter* provision on abduction cases.

(1892), involving the kidnapping of a 15 year old from New York and his detention in a Canadian reformatory. 4 J. Moore, *A Digest of International Law* 330 (1906).

On the converse of the coin, Cole describes the *Kahosed Case* (1960), involving the arrest of two Canadian Indians on Canadian territory by Michigan State Police. Cole, *op. cit.* at 41. While both defendant entered pleas of guilty to United States criminal charges, nevertheless, on the insistence of the Canadian government, thereafter the United States government notified the authorities of all U.S. states bordering on Canada to avoid future incidents of this nature.[4]

Cole also describes the *Anderson Case* (1974), where on August 24, 1974 James Anderson on driving across the border at Bellingham, Washington was identified by U.S. officials as a U.S. Army deserter and asked that he come inside for examination. Anderson immediately left his car and ran back across the border. He was pursued by U.S. officials and apprehended on Canadian Territory. He was forcibly taken back across the border and turned over to the Federal Bureau of Investiagtion. Following a protest by the Canadian government, Anderson was returned to Canada on August 30, 1974. *Id.* at 42.

Since Cole's report, there have been two other incidents of significance involving official transborder abductions from Canada to the United States. Prior to them, Canada had no notice that the United States regarded its extradition treaty obligations to be other than exclusive.

On September 24, 1981, agents of an American bonding company abducted Sydney Jaffe, a Canadian citizen, from Toronto, Ontario and returned him to Florida for

---

[4] This action was markedly similar to Secretary Blaine's action in 1881, exhorting the Governor of Texas to abide by and not to evade the extradition treaty between Mexico and the United States, referred to at Pet. Br. 29 n. 24. Hence, petitioner can find no solace in the fact that Secretary Blaine's letter antedated the decision in *Ker v. Illinois*, 119 U.S. 436 (1886).

trial on fraud charges. In some fifteen diplomatic notes dating from 1981 to 1986, the Canadian government alleged that the abductors had acted pursuant to a plan promoted by officials of the State of Florida and under color of authority of that state and demanded Jaffe's return and restoration of the *status quo ante*. The United States government declined to take a position whether the abduction had been officially endorsed. But the U.S. Department of Justice and the U.S. Department of State requested the Florida Probation and Parole Commission to grant Jaffe an early release. In this context, the Secretary of State wrote on July 22, 1983, that:

> As no good reason appears why the extradition treaty was not utilized to secure Mr. Jaffe's return, it is perfectly understandable that the Government of Canada is outraged by his alleged kidnapping, which Canada considers a violation of the treaty and of international law, as well as an affront to its sovereignty. *Appendix*, p. 2a.

Jaffee was granted an early release and returned to Canada in 1983.[5]

---

[5] When on June 27, 1983, Canada filed a *habeas corpus* action, *i.e.*, *Canada v. Wainwright, et al.*, Misc. No. 83-661-Civ. J-16 (M.D. Fla.), in a U.S. Department of State note dated December 19, 1983, which in summary form was submitted to the District Court in the context of the action, the United States informed Canada that it had no objection to Canada's filing of that action. Nevertheless, although the Court of Appeals for the Eleventh Circuit suggested that the District Court invite the United States to intervene, see *Canada v. Wainwright, et al.*, No. 85-3248 (April 11, 1985), neither such an invitation nor such an intervention resulted. In its Order, the Court of Appeals expressed some doubt, without deciding, whether a petition by Canada for a writ of *habeas corpus* could be entertained, but held that "Canada has properly invoked the jurisdiction of the district court to entertain a claim arising under a United States treaty." In 1986, the U.S. District Court nonetheless dismissed Canada's action on the alternative grounds that Canada lacked standing to maintain the action, and that a political question was presented. *Canada v. Wainwright, et al., supra* (M.D. Fla., Jan. 31, 1986). Jaffe's own *habeas corpus* action failed in the

In the wake of the Jaffe case, the United States undertook in relation to "bounty hunter" abductions only to consult on the return of abducted persons to Canada. See *Appendix*, pp. 5a-7a.

In April 1991, the United States took the formal and unequivocal position *vis-a-vis* Canada that, as it maintains in this case, return of a criminal defendant is not an appropriate remedy under circumstances of an official abduction. As indicated in this brief, there have been numerous instances in both countries where persons abducted from one have been returned following protest by the other.

Notification took place in the case of *Derrick Hills* who, on January 4, 1991, was apprehended by a Windsor City police officer, some two hundred yards within the United States, in the Windsor-Detroit tunnel. The United States lodged a protest and requested a statement of Canadian intentions. The note asserted, apparently gratuitously, that "under United States law judicial dismissal of criminal charges, or judicially ordered release . . . is not an appropriate remedy for a violation of territorial sovereignty." [6]

Canada rejected the American position and indicated its understanding that the extant extradition treaty "established the only means under which to obtain the return of fugitive offenders." [7] Canada apologized and Hills was returned to American territory to await a

---

absence of proof of official involvement in his abduction. *Jaffe v. Smith*, 825 F.2d 304 (11th Cir. 1987). The abductors were extradited to Canada. *Cf., Kear v. Hilton*, 699 F.2d 181 (4th Cir. 1983). The merits of Canada's suit were never reached.

[6] *U.S. Embassy Note No. 94 of April 8, 1991.* Diplomatic custom precludes publication of another government's communications not otherwise made public. However, a quotation is permissible in circumstances where paraphrasing may be misleading.

[7] *Department of External Affairs Note No. JLAC-0734 of April 24, 1991*, reproduced in our *Appendix*, p. 7a.

proper extradition request. Thereafter, the United States expressed its satisfaction concerning the resolution of Hills' case but indicated its disagreement with the Canadian position concerning exclusivity of the Treaty.[8]

As manifested by the incidents detailed, upon protest, it has been the consistent policy of Canada to view its obligations under the treaty as requiring the return of an abducted person. In this effort, provincial governments have consistently cooperated. Hence, intervention of Canadian courts had not even been necessary.

There can be no doubt that the current position of the petitioner represents a belated departure from the common understanding of civilized nations as to the function and scope of extradition treaties. In effect, the Executive Branch of the United States Government seeks the right, on a case by case basis, to disavow obligations it assumed with the consent of the United States Senate. Such a position is not based on law, and would give any nation entering into a treaty with the United State concern as to its implementation. In the long run, it would breed suspicion and lack of cooperation in the enforcement of criminal laws, and thus defeat the purposes for which apparently it is offered.

Canada and the United States have a vital interest in the continuing efficiency of the law enforcement activities centering on the Extradition Treaty. Approximately half of all American requests for extradition are made to Canada, and former Secretary of State George P. Shultz indicated that "Canada is our most important extradition treaty partner and . . . the maintenance of the excellent extradition relationship we have had with Canada is greatly in the law enforcement interest of . . . the . . . states, as well as of the federal government". *Appendix*, p. 3a.

Under the common legal tradition of the United States, Canada, and other nations, the decision as to whether to

---

[8] *U. S. Embassy Note No. 133 of May 23, 1991.*

adhere to a law or treaty should not be left to the discretion of the particular Executive officials in office. Laws and treaties must, and do, have a more solid foundation, see, *e.g.*, *American School of Magnetic Healing v. McAnnulty*, 187 U.S. 94 (1902), and this Court should not approve the petitioner's present effort to restrict their efficacy.

To do so would raise genuine concern that the long standing practice of returning persons abducted by the United States is imperilled. Of equal concern is the danger that a decision by the Court in favor of the petitioner would impart to officials in the United States, particularly at the State and local level, the impression that this Court has sanctioned the practice of unlawful abductions across the Canada-United States border.

Canada will continue to protest such abductions when they occur and to seek the extradition and prosecution of those responsible, whether they be private individuals or federal, state or local law enforcement officers. A decision by the Court to dismiss petitioner's application would virtually eliminate the possibility that Canada would be forced into such an undesirable situation.

CONCLUSION

For the foregoing reasons, Canada urges the Court to affirm the judgment of the court of appeals.

Respectfully submitted,

AXEL KLEIBOEMER
2600 Virginia Avenue, N.W.
Suite 513
Washington, D.C. 20037
(202) 337-9030
Counsel of Record for Canada

Of Counsel:
WILLIAM H. CORBETT, Q.C.
Senior General Counsel
Department of Justice
Ottawa, Canada

March 1992

APPENDICES

APPENDIX A

Statement of Secretary Shultz, June 22, 1983

STATE OF FLORIDA
PROBATION AND PAROLE COMMISSION

IN RE: SIDNEY LEONARD JAFFE
INMATE #082007

STATEMENT OF GEORGE P. SHULTZ,
SECRETARY OF STATE

I urge you to grant parole to Sidney Jaffe on the ground that his continued incarceration will exacerbate the already severe strain placed on the relations of the United States with Canada arising out of circumstances under which Mr. Jaffe was returned from Canada to Florida to face the charges which resulted in his imprisonment.

The circumstances of Mr. Jaffe's return from Canada to Florida were examined in the opinions of the United States Court of Appeals for the Fourth Circuit and the United States District Court for the Middle District of Florida in the cases of Daniel Kear and Timm Johnsen, respectively. In brief, the courts found that Kear and Johnsen were extraditable to Canada, a showing having been made of probable cause to believe that the two "bounty hunters," who were acting as agents of the company that had posted bond for Mr. Jaffe, had kidnapped Jaffe in Toronto, Canada and had brought him back to Florida.

The United States has an extradition treaty with Canada. That treaty could have been utilized to secure

Mr. Jaffe's return; no one has suggested the contrary. How, then, did it happen that Mr. Jaffe was returned by Kear and Johnsen? Canada, in a petition for writ of habeas corpus filed in the United States District Court for the Middle District of Florida, alleges that Kear and Johnsen were "acting pursuant to a plan promoted by officials of the State of Florida and under the color of authority of the State of Florida." The officials of the State of Florida whose conduct has been called into question by Canada deny the charges, I understand, and I do not now take any position on the question whether there was state action or involvement in the alleged kidnapping of Mr. Jaffe.

However, failure to utilize our extradition treaty with Canada to secure Mr. Jaffe's return does appear to be attributable to the Office of State Attorney Stephen L. Boyles, according to the report to Governor Graham prepared by the Governor's General Counsel. On May 18, 1981, when Mr. Jaffe failed to appear, Judge Perry ordered the State Attorney to initiate extradition proceedings. Any request for Mr. Jaffe's extradition would have been made by the Governor on the basis of supporting materials prepared by the State Attorney's office. Documents submitted by the State Attorney's office were found by the Governor's office to be legally insufficient to support a request for Mr. Jaffe's extradition on July 2, and again on July 23, 1981. Mr. Jaffe was returned from Canada under the circumstances of which Canada complains on September 24, 1981. In the intervening two months the State Attorney's Office failed to make any further effort to submit legally sufficient documentation to the Governor's office in support of a request for Mr. Jaffe's extradition.

As no good reason appears why the extradition treaty was not utilized to secure Mr. Jaffe's return, it is perfectly understandable that the Government of Canada is outraged by his alleged kidnapping, which Canada con-

siders a violation of the treaty and of international law, as well as an affront to its sovereignty.

I wish to emphasize that Canada is our most important extradition treaty partner and that the maintenance of the excellent extradition relationship we have had with Canada is greatly in the law enforcement interest of Florida and the other states, as well as of the federal government. Indeed, in the last three full calendar years, sixty per cent of the fugitives surrendered to the United States pursuant to extradition requests made by states, as opposed to the federal government, were surrendered by Canada.

Moreover, quite apart from law enforcement cooperation, the Jaffe case threatens to have a generally deleterious effect on our relationships with Canada. Canadian authorities have raised this matter in virtually every recent high level contact between our two nations. It is simply in the national interest that this case no longer be permitted to intrude upon our relations with one of our most important and highly valued neighbors, allies and trading partners.

For the foregoing reasons, I urge you to grant parole to Sidney Jaffe.

/s/ George P. Shultz
GEORGE P. SHULTZ
Secretary of State

July 22, 1983
Date

APPENDIX B

Letter of Secretary Shultz, January 11, 1988

THE SECRETARY OF STATE

WASHINGTON

January 11, 1988

Dear Mr. Minister:

I refer to the Protocol Amending the Treaty on Extradition between the United States and Canada we signed today and have the honor to address to you the following.

The United States and Canada recognize that the transborder abduction of person found in Canada to the United States of America by civilian agents of bail bonding companies, so-called "bounty hunters", is an extraditable offense under the United States—Canada Extradition Treaty.

Where a person has been charged with or convicted of such an offense in Canada and is found within the jurisdiction of the United States, the United States agrees, upon request, to commence extradition proceedings against such a person pursuant to the Treaty in order that the person may be returned to Canada.

The United States will use its best efforts to honor Canadian requests for testimony, information, or other assistance pertaining to such abductions.

Canada and the United States agree to cooperate to deter such transborder abductions. To assist in achieving that purpose, the United States will continue to exert its best efforts to inform those engaged in business as bail bondsmen or bounty hunters and other interested parties of the positions set forth in this exchange of letters.

Canada and the United States agree to consult promptly concerning any case of transborder abduction involving bounty hunters which might arise in the fu-

ture. The purpose of such consultations shall be to address matters relating to any such case, including any request by the Government of Canada for the return of the person so abducted. In the event of return, the Governments agree to co-operate to have the abducted person escorted to Canada and taken into custody at the border, pursuant to a request for provisional arrest, pending the outcome of extradition proceedings. For the purpose of these consultations, the principal law enforcement contact for the United States will be the Director of the Office of International Affairs of the Criminal Division of the Department of Justice.

I have the honor to propose that this letter and your reply constitute an understanding between our two Governments which is not intended to create or otherwise alter legal obligations for either Government nor to create or otherwise alter any rights or privileges for private parties.

Sincerely yours,

/s/ George P. Shultz
GEORGE P. SHULTZ

The Right Honorable

Joe Clark, P.C., M.P.,
Secretary of State
For External Affairs of Canada,
Ottawa.

APPENDIX C

Letter of Secretary Clark, January 11, 1988

THE RT. HON. JOE CLARK, P.C., M.P.
SECRETARY OF STATE FOR EXTERNAL AFFAIRS

CANADA

Ottawa, January 11, 1988

JLA-0026

Dear Mr. Secretary:

I have the honour to acknowledge receipt of your letter of today's date concerning transborder abduction of persons found in Canada to the United States of America by civilian agents of bail bonding companies, so-called "bounty hunters". I accept your proposal that your letter and this reply constitute an understanding between our two Governments which is not intended to create or otherwise alter legal obligations for either Government nor to create or otherwise alter any rights or privileges for private parties.

Yours sincerely,

/s/ Joe Clark

The Honorable George P. Shultz
Secretary of State of the
United States of America

APPENDIX D

Department of External Affairs Note No. JLAC-0731, April 24, 1991

No. JLAC-0734

The Department of External Affairs presents its compliments to the Embassy of the United States of America and has the honour to refer to the Embassy's Note No. 94 of April 8, 1991, concerning the arrest at the United States end of the Windsor-Detroit Tunnel of an American citizen, Derrick Hills, by a Canadian police officer. The note expressed the concern of the Government of the United States about this purported infringement of its territorial sovereignty. In that context, the Embassy requested Mr. Hill's release.

Under International Law, States are obliged to refrain from performing jurisdictional acts, such as arresting fugitives accused of a crime, within the territory of other States except by virtue of general or special permission. Investigation by the competent Canadian authorities has established that the arrest occurred in the United States and, therefore, the Government of Canada regrets this infringement of the territorial soverignty of the United States.

The Department of External Affairs, through the Department of Justice, requested the Attorney General of Ontario to seek the release of Mr. Hills. The Attorney General of Ontario agreed to the request. As a result the proceedings were stayed and Mr. Hills was released on April 16, 1991.

The Treaty on Extradition between Canada and the United States (Amended by an Exchange of Notes) of December 3, 1971 was negotiated, inter alia, to make more effective the cooperation between our two countries in law enforcement matters. The Extradition Treaty, along with the relevant multilateral conventions, if any,

established the only means under which to obtain the return of fugitive offenders.

It is the understanding of Canadian authorities that Mr. Hills returned to the United States. Documentation in support of a request for Mr. Hill's provisional arrest and extradition under the Treaty was prepared and forwarded through normal channels Mr. Hills has been arrested pursuant to the Canadian request. The Government of Canada appreciates the continued cooperation of the Government of the United States in the execution of this request.

The Government of Canada looks forward to continuing the extensive bilateral cooperation between our two governments in these matters.

The Department of External Affairs avails itself of this opportunity to renew to the Embassy of the United States of America the assurances of its highest consideration.

OTTAWA, April 24, 1991

APPENDIX E

Canadian Embassy Note No. 542, Ocotber 13, 1982

The Embassy of Canada presents its compliments to the Department of State and has the honour to inform it that the Embassy has been instructed to remind the Department of State that a reply has not been received to the Memorandum of Law of the Canadian Department of Justice which was left with Associate Attorney General Guiliani on August 6 1982 during a meeting with Canadian officials and Mr. Axel Kleiboemer, Counsel to the Attorney General of Canada. In this connection, the Embassy understands that the letter dated August 9, 1982 from Attorney General William French Smith to former Attorney General of Canada Jean Chretien has been superseded in view of the above mentioned August 6th discussions with Mr. Guiliani.

The Department of Justice Memorandum of Law had requested that the U.S. Department of Justice initiate Habeas Corpus proceedings with a view to obtaining Mr. Jaffe's release and return to Canada. The memorandum had submitted that under U.S. law, the Federal Government of the U.S.A. has the obligation to assist Canada by commencing proceedings leading to Jaffe's return to Canada. This obligation is based on the violation of the Canada-U.S.A. Extradition Treaty, a violation attributable to the ". . . actions of state officials or from the actions of those persons who act at the instigation of and or under color of authority of a state. In Jaffe's case, Johnsen and Kear, who, as a matter of law, had no rights as bondsmen, acted at the instigation of and under color of authority of the State of Florida".

In this connection, the attention of the Canadian authorities has been drawn recently to the parties briefs in the case of Accredited Security and Casualty Company, Inc., Appellant vs State of Florida and Putnam County Florida, Appellees. Relevant documentation is at-

tached. Attached also is a copy of a letter dated September 24, 1982 from the law firm of Dearing and Smith of Tallahassee, Florida to the Honourable D. Lowell Jensen, Director, Criminal Division, U.S. Department of Justice commenting on the question of "state action" by the Florida authorities. In the view of the Canadian authorities, this material provides additional substantiation of complicity by the Florida authorities in the activities of Messrs. Johnsen and Kear resulting in the abduction from Canada of Sidney Jaffe.

The Embassy of Canada avails itself of this opportunity to renew to the Department of State the assurances of its highest consideration.

Washington, D.C.

October 13, 1982